APPENDIX A

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

TOP RANK, INC. and,
AMERICA PRESENTS, LTD.,

Plaintiff,

vs. CASE NO.: 2000 CV 001325

FLORIDA STATE BOXING COMMISSION; ALEIDA O. WALDMAN, Chair, Florida State Boxing Commission; ALVIN E. ENTIN, Member, Florida State Boxing Commission; EDWARDO R. LACASA, Member, Florida State Boxing Commission; DONALD PERRY, Member, Florida State Boxing Commission; JERRY WAGES; Member, Florida State Boxing Commission; FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION; CHRIS MEFFERT, Executive Director, Florida State Boxing Commission, Department of Business and Professional Regulation; and ROBERT F. MILLIGAN, Comptroller, State of Florida,

Defendants.

_____/

FINAL SUMMARY JUDGMENT FOR DEFENDANTS

This case came before the court upon the Plaintiff's Motion for Summary Judgment, filed April 28, 2001. Having considered the pleadings, motions, responses, and oral argument presented at the haring on August 16, 2001, the court finds and orders as follows:

In their amended complaint, the Plaintiffs seek a declaration that Section 548.014, and 548.06, Florida Statutes, and Rule 61K1-1.042, Florida Administrative Code, violate the First Amendment of the United States Constitution by abridging the plaintiffs' freedom of speech and freedom of the press. Further, the plaintiffs allege that the defendants have acted under color of state law through the challenged provisions to deprive the plaintiffs for the constitutional rights of free speech and freedom of the press. Finally, the plaintiffs seek a refund of the taxes they paid pursuant to the challenged provisions.

Section 548.012, Florida Statutes, prohibits promoting of boxing or kickboxing matches involving professional contestants by unlicensed promoters.[1] Section 548.014, Florida Statutes, requires licensed promoters to post a surety bond with the Florida State Boxing Commission. Section 548.06 requires promoters to file a written report on the number of tickets sold and gross receipts, and to pay a tax to the commission of 5 percent of the total gross receipts.[2]

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[1] The section provides:

548.012 Promoter's license. --

(1) A promoter may not, directly or indirectly, promote any match involving a professional, unless the promoter has been issued a license therefore by the commission.

(2) A violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

[2] The section provides:

548.06 Payments to state; exemptions. --

(1) A promoter holding a match shall, within 72 hours after the match, file with the commission a written report which includes the number of tickets sold, the amount go gross receipts, and any other facts the commission may require. For the purposes of this chapter, total gross receipts include:

(a) The gross price charged for the sale or lease of broadcasting, television, and motion picture rights without any deductions for commissions, brokerage fees, distribution fees, advertising, or other expenses or charges;

Pursuant to subsection 548.06(1)(a), gross receipts include "the gross price charged for the sale or lease of broadcasting, television or motion picture rights." There is no dispute of material fact and the parties agree that Top Rank Inc. and America Presents, Ltd. are promoters as defined by the statutory chapter, and that plaintiffs Top Rank has paid taxes in the amount of $22,874.80 on sales of its broadcasting rights, pursuant to Section 548.06(2). The parties agree that Section 548.06(2) requires the plaintiffs to pay a tax on their gross receipts form sales of the Florida distribution rights for closed circuit television broadcasts of professional boxing matches.

While there are no genuine disputes of material facts in this case, the plaintiffs are not entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510(c). The plaintiffs argue that the regulation and taxation of boxing promoters by the challenged statute sis an unconstitutional restriction of expression based upon the content of the broadcast. The plaintiffs further argue that the selective taxation of boxing broadcasts is tantamount to censorship of the message boxing conveys.

(b) The portion of the receipts from the sale of souvenirs, programs, and other concessions received by the promoter; and

(c) The face value of all tickets sold and complimentary tickets issued.

(2) The written report shall be accompanied by a tax payment in the amount of 5 percent of the total gross receipts exclusive of any federal taxes, except that the tax payment derived from the gross price charged for the sale or lease of broadcasting, television, and motion picture rights shall not exceed $40,000 for any single event.

(3) (a) Any promoter who willfully makes a false and fraudulent report under this section is guilty of perjury and, upon conviction, is subject to punishment as provided by law. Such penalty shall be in addition to any other penalties imposed by this chapter.

(b) Any promoter who willfully fails, neglects, or refuses to make a report or to pay the taxes as prescribed or who refuses to allow the commission to examine the books, papers, and records of any promotion is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

The court finds that the challenged statutes and rule are not presumptively unconstitutional as impermissible content-based burdens on speech. To the contrary, the First Amendment is not implicated in this case. Section 548.06(1)(a), Florida Statutes is a gross receipts tax on the sale of the intangible right to broadcast or televise a boxing event. The promoter is the original owner of the right, and he may chose to sell or retain his right to broadcast or televise. Only when the plaintiffs chose to sell or lease their rights to broadcast or televise boxing events was Section 548.06(1)(a) applied to them. The tax challenged by the plaintiffs is applicable only to the sale of rights by the plaintiffs. The purchaser of the rights from the rights from the promoter is not taxed under Section 548.06, nor are the use or uses of the rights to broadcast after the initial sale by the promoter. Unlike the situation in *TVKO v. Howland*, where the challenged Oregon statute taxed the actual broadcast by the broadcaster of boxing matches held out state, and unlike *United States Satellite Broadcasting Co. v. Lynch*, 41 F. Supp. 2d 1113 (E. D. Calif. 1999), however the challenged California statute taxed the telecast itself and the plaintiff was the actual broadcaster of the boxing matched, the plaintiffs here are promoters and the tax is on the sale for profit of their broadcast rights to telecasters or broadcasters.

The plaintiffs have filed to show that they are entitled as a matter of law to a declaration that Sections 548.06(1)(b) or 548.06(1)(c) , 548.012 and 548.014 violate the Constitution. Accordingly, there is no factual or legal basis at issue in this suit upon which to declare these sections invalid.

IT IS THEREFORE ORDERED and ADJUDGED that Summary Judgment is hereby entered in favor of the Defendants and Sections 548.012, 548.014, and 548.06, Florida Statutes and Rule 61K1-1.042, Florida Administrative Code are facially valid under the First Amendment to the United States Constitution.

DONE AND ORDERED this 8th day of November, 2001.

s/ P. Kevin Davey
P. Kevin Davey
Circuit Judge

Copies to:

Eric J. Taylor, AAG
Kenneth R. Hart, Esq.
Bernard Nash, Esq.
David Englehardt, Esq.
Maria Heard, Esq.

APPENDIX B

District Court of Appeal of Florida,

First District.

TOP RANK, INC., America Presents, Ltd., and Showtime Networks, Inc.,

Appellants,

v.

FLORIDA STATE BOXING COMMISSION, et al.,
Appellees.

No. 1D01-4951.

Jan. 8, 2003.

Rehearing Denied Feb. 20, 2003.

Boxing promoters and cable television programmer brought action against Boxing Commission, seeking declaratory judgment that statute imposing a five percent tax on total gross receipts from a boxing match violated the cable programmer's and promoters' freedom of speech under the First Amendment. The Circuit Court, Leon County, P. Kevin Davey, J., dismissed cable programmer as a party and entered judgment against promoters. Promoters and cable programmer appealed. The District Court of Appeal, Wolf, J., held that: (1) boxing is not pure or symbolic speech protected by the First Amendment; (2) statute does not violate First Amendment; and (3) cable programmer lacked standing to bring action.

Affirmed.

Stephen H. Grimes and Susan L. Kelsey, Holland & Knight LLP, Tallahassee, for Appellants.

Robert A. Butterworth, Attorney General; Eric J. Taylor, Assistant Attorney General, Tallahassee, for Appellees.

WOLF, J.

Appellants, Top Rank, Inc. (Top Rank), America Presents, Ltd. (America Presents), and Showtime Networks, Inc. (Showtime), argue on appeal that the trial court erred in determining that section 548.06, Florida Statutes, which imposes a 5% tax on boxing promoters, did not violate the freedom of speech provisions of the First Amendment of the United States Constitution. Showtime additionally argues that the trial court erred in dismissing Showtime as a party plaintiff. We do not find error as to either of the trial court's rulings at issue here.

Section 548.06, Florida Statutes (2000), provides in pertinent part as follows:

> (1) A promoter holding a match shall, within 72 hours after the match, file with the commission a written report which includes the number of tickets sold, the amount of gross receipts, and any other facts the commission may require. For the purposes of this chapter, total gross receipts include:
> (a) The gross price charged for the sale or lease of broadcasting, television, and motion picture rights without any deductions for commissions, brokerage fees, distribution fees, advertising, or other expenses or charges;
> (b) The portion of the receipts from the sale of souvenirs, programs, and other concessions received by the promoter; and
> (c) The face value of all tickets sold and complimentary tickets issued.
> (2) The written report shall be accompanied by a tax payment in the amount of 5 percent of the total gross receipts exclusive of any federal taxes, except that the tax payment derived from the gross price charged for the sale or lease of broadcasting, television, and

> motion picture rights shall not exceed $40,000 for any single event.

A "promoter" is defined as "any person ... who produces, arranges, or stages any match involving a professional." § 548.002(15), Fla. Stat. (2000).

Two of the appellants, Top Rank and America Presents, are licensed boxing promoters that arrange live professional boxing events. Many of these events are made available to consumers on a pay-per-view basis through distributers or broadcasters such as Showtime which distribute the programs through local cable TV operators who charge viewers a fee. Section 548.06, Florida Statutes, requires a promoter to pay a tax on these boxing events in the amount of 5% of the total gross receipts, as defined in the statute. The Florida Boxing Commission sent demand letters to Top Rank and America Presents, seeking the 5% gross receipts tax due pursuant to the statute. Top Rank has refused to pay the 5% tax since 1998 or to comply with associated regulations on the grounds that the tax and regulations are unconstitutional; America Presents likewise refused to pay the tax or comply with the requirements in connection with a boxing event that it promoted. Showtime claimed that it could be considered a promoter under Florida law and thus potentially liable for the tax; it joined Top Rank and America Presents in filing a complaint in which the three sought declaratory and injunctive relief based on allegations that the statute imposing the tax is unconstitutional under the First Amendment.

The trial court granted a motion to dismiss Showtime on the basis that Showtime lacked standing since it had not yet been assessed the boxing tax, and the court entered final summary judgment against Top Rank and America Presents, finding section 548.06, Florida Statutes, facially valid under the First Amendment. We determine that a boxing match does not constitute either pure or symbolic speech and

decline to extend First Amendment protection to the promoters of a boxing match. We, therefore, uphold the facial validity of the statute. We also determine that the statute on its face does not apply to the distributors of boxing matches to cable networks; thus, we find that the trial court did not err in dismissing Showtime's facial challenge to the statute.

The United States Supreme Court has determined that cable TV is a member of the media for conveying speech which is protected by the First Amendment. *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L.Ed.2d 494 (1991). Subsequently, in *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994), the court recognized that the cable television industry, including "cable operators" and "cable programmers," are entitled to First Amendment protections. Appellant relies on three cases where taxation of cable operators and cable programmers for broadcasting boxing matches has been found to violate the First Amendment: *United States Satellite Broadcasting Co. v. Lynch*, 41 F. Supp. 2d 1113 (E.D. Cal. 1999); *Showtime Networks, Inc. v. Georgia State Boxing Commission*, slip. op. (Ga. Superior Ct. Nov. 23, 1999) (Case No.1999CV04184); and *TVKO v. Howland*, 2001 WL 562822, (15 Or. Tax 335 May 17, 2001) (Case No. 4445). None of these cases, however, involve taxation of a boxing promoter.

In *United States Satellite*, the State of California imposed a five percent tax on the actual broadcast of a fight, which was assessed directly against the broadcaster or cable operator who directly transmitted the fight to the viewers. There, the court specifically noted that it was not dealing with a tax on the promoter of the fight, but a tax on the dissemination of entertainment. *Id.* at 1121. In *Showtime Networks, Inc.*, the Georgia tax purportedly applied to boxing promoters, but the Georgia statute was so broad it

encompassed distributors, broadcasters, and cable programmers, all of which were held to be protected by the First Amendment in *Turner Broadcasting*. In fact Showtime, which is a cable programmer, was determined to be a promoter under the broad language of the Georgia statute. In *TVKO*, the Oregon taxing statute specifically defined a promoter to include the person who has the distribution rights to a pay-per-view telecast. *Id.* at 338. Unlike the California, Georgia, or Oregon statutes at issue in *United States Satellite*, *Showtime Networks, Inc.*, and *TVKO*, the Florida statute clearly does not apply to a cable operator, to a distributor, or to a cable programmer. *See* § 548.002, Fla. Stat. (2000). Section 548.06 specifically applies only to a promoter.

Appellants urge us to extend the First Amendment safeguard from taxation to transactions other than those relating directly to the right to broadcast or the right to distribute to the broadcaster, arguing (1) the result is mandated by the holding in *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991); (2) the act of promoting a boxing match and broadcasting the match is protected by the First Amendment and any burden placed solely on this activity would be a content related regulation which runs afoul of the First Amendment; and (3) the method of calculating the tax is a direct burden on the right to broadcast in violation of the First Amendment. For the reasons stated herein, we reject these arguments.

In *Simon & Schuster*, the supreme court struck down New York's "Son of Sam" law, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account and be made available to the victims of the crime. There, the court found that the statute impermissibly imposed a financial burden on the speakers because of the content of

their speech. *Id.* at 508. In *Simon & Schuster*, the State Victims Crime Board argued that the burden of the tax fell on the promoter of the book and the criminal rather than the media which is directly involved in the distribution process. The Boxing Commission makes the same argument in this case. The supreme court rejected the state's argument in *Simon & Schuster*:

> Finally, the Board claims that even if the First Amendment prohibits content- based financial regulation specifically of the media the Son of Sam law is different, because it imposes a general burden on any "entity" contracting with a convicted person, to transmit that person's speech.... This argument falters on both semantic and constitutional grounds. Any "entity" that enters into such a contract becomes by definition a medium of communication, if it was not one already. In any event, the characterization of any entity as a member of the "media" is irrelevant for these purposes. The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.

Id. at 117, 112 S. Ct. 501 (citations omitted, emphasis in original). Thus, if we were dealing with either pure speech or symbolic speech, we would be required to reject the Boxing Commission's argument that merely because a person or entity may be several steps removed from the actual dissemination of speech, they are not entitled to First Amendment protections.

Financial burdens placed on the cable television process, however, do not necessarily implicate the First Amendment. *See Leathers v. Medlock*, 499 U.S. at 445-446, 452, 111 S. Ct. 1438. Taxation will implicate the First Amendment if it discriminates against members of the media or if it discriminates based on the content of the speech. *Id.* at 446,

111 S. Ct. 1438. In the instant case we are not dealing with taxation of a member of the media. Furthermore, the act of boxing does not involve either pure or symbolic speech. *See Murdock v. City of Jacksonville*, 361 F. Supp. 1083 (M.D. Fla. 1973).

The supreme court in *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L.Ed.2d 342 (1989), stated that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," a court has to ask whether "[a]n attempt to convey a particularized message was present, [and whether] the likelihood was great that the message would be understood by those who viewed it." That inquiry is pertinent in the instant case in determining whether boxing possesses "sufficient communicative elements" to bring it under the protection of the First Amendment. The question here is whether boxing, an athletic event where the participants are attempting to win prize money, is a form of conduct which contains elements of communication or involves pure speech or symbolic speech protected by the First Amendment.

In *Justice v. National Collegiate Athletic Association*, 577 F. Supp. 356 (D. Ariz. 1983), the court ruled that playing football was not pure speech but rather a physical activity:

> In its most basic form, athletic competition does not constitute pure speech; rather, participation in athletic competition constitutes physical activity or conduct.

Id. at 374. In *Justice*, the court found that there was no First Amendment interest at stake relative to the National Inter-Collegiate Athletic Association's imposition of sanctions on the university which rendered the football team ineligible for post-season play or television appearances. The court found that those sanctions did not constitute a prior restraint upon

the players' First Amendment freedom of expression. *Id.* at 375. The *Justice* case, citing to the United States Supreme Court's analysis in *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974), points out that the issue in determining the applicability of the First Amendment to conduct is whether the conduct is sufficiently communicative. There the court found that a conduct-oriented activity like sports is not entitled to the same First Amendment protection which other more "communicative" forms of entertainment have been afforded, such as jazz concerts and nude dancing. *Id.* at 374, citing *Fact Concerts, Inc. v. City of Newport*, 626 F.2d 1060 (1st Cir. 1980) (jazz concerts); *Venuti v. Riordan*, 521 F. Supp. 1027 (D. Mass. 1981) (nude dancing). In *Sunset Amusement Co. v. Board of Police Commissioners of the City of Los Angeles*, 7 Cal. 3d 64, 74, 496 P.2d 840, 845-846, 101 Cal. Rptr. 768, 774 (1972), the court, in ruling that roller skating is not a constitutionally protected activity, stated that "no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs." *See also MacDonald v. Newsome*, 437 F. Supp. 796, 798 (E.D.N.C. 1977) (concluding that surfboarding is not an activity protected by the First Amendment).

In *Murdock v. City of Jacksonville*, 361 F. Supp. 1083 (M.D. Fla. 1973), the plaintiff alleged that he had a substantial interest protected by the First and Fourteenth Amendments to the United States Constitution in promoting wrestling exhibitions. There, the court rejected that argument stating that wrestling is not pure speech, free speech, "akin to free speech," or a symbolic act protected by the Constitution:

> There can be no serious contention, and none has been advanced by plaintiff, that wrestling constitutes "pure

> speech" as that phrase is used by the Supreme Court. Neither does this Court believe that wrestling is an activity "akin to free speech" as that phrase was used in *Tinker v. Des* Moines *Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969). In that case the Court held that the symbolic act of wearing politically significant armbands to protest the Vietnam war was "akin to free speech."
>
> ....
>
> The symbolic acts which were protected by the First and Fourteenth Amendments in [symbolic speech] cases have no constitutional resemblance to the promotion of a wrestling match for entertainment. The promotion of wrestling matches in this case is not a symbolic act, nor is the wrestling match itself a symbolic act, protected by the First Amendment. Wrestling is just not "free speech", "akin to free speech", nor a "symbolic act".

Id. at 1095-1096 (footnote omitted).

In distinguishing a case relied upon by the plaintiff in *Murdock*, the court further stated,

> This case does not involve a speech by a public figure or anything of that nature, but only concerns the right to promote wrestling, a purely entertainment pastime. There is no evidence which could conceivably support the idea that the promotion of professional wrestling involves speech or symbolic acts equivalent to [protected] speech ....

Id. at 1096.

A similar view was expressed in *Post Newsweek Stations-Connecticut v. Travelers Insurance Co.*, 510 F. Supp. 81 (D. Conn. 1981):

> It is not disputed that entertainment is news, but the entertainment here is the exposition of an athletic exercise. As such, it is on the periphery of protected speech (for purposes of a balancing of conflicting interests), as opposed, for example, to political speech, which is at the core of [F]irst [A]mendment protection.

Id. at 86 (citation omitted).

We recognize that athletic events provide people with a great deal of entertainment. We, however, agree with the views expressed in the previously cited cases that most athletic events do not convey any message, symbolic or otherwise.[1] [FN1] Thus, the regulated activity in this case is clearly distinguishable from the pure speech which was regulated in *Simon & Schuster*.

Appellant argues that even if the boxing match itself does not constitute speech, that the interviews and commentary which are broadcast with the fight implicate the First Amendment. We reject this argument. The activity that is being taxed is the promotion of the boxing match and not the provisions of commentary and interviews.

The main argument of appellants is that the taxing statute at issue here violates the First Amendment as an illegal content-based regulation. In *Leathers v. Medlock*, the supreme court rejected the idea that intermedia and intramedia discrimination violates the First Amendment absent any evidence of intent to suppress speech or any effect on the expression of particular ideas. *Id.* at 447, 111 S. Ct. 1438. The court in *Leathers v. Medlock* examined the case of *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983), and stated

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[1] I am in fact an enthusiastic sports fan, but I do not believe we should dilute the significance of First Amendment protection by making it applicable to all athletic endeavors.

that it "stood for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the bases of ideas." *Id.* at 450. The entire focus in reviewing content-based regulation is that government will not attempt to limit dissemination of a particular message or idea. As stated herein, boxing conveys no message or idea; therefore, it has no content which is protected by the First Amendment.

The final argument made by appellants is that because the amount of tax assessed is based on the direct receipts of the broadcast, it is an impermissible tax on the cable distributors. As we discussed earlier, however, the tax is assessed on the privilege of promoting a boxing match, which is not protected by the First Amendment. We, therefore, reject this contention.

We find no error in the trial court's dismissing Showtime from this litigation. Showtime is a provider of cable programming. Appellee concedes in its brief that Showtime is not covered by the definition of promoter in the statute. There is no evidence that the Department of Revenue has ever attempted to apply the statute to Showtime. Showtime's greatest concern seems to be with the rules adopted by the boxing commission rather than the statute itself. Under these circumstances, the trial court properly dismissed Showtime as a party.

ERVIN and BARFIELD, JJ., concur.

APPENDIX C

TOP RANK, INC., ETC., ET AL., Petitioner(s) vs. FLORIDA STATE BOXING COMMISSION, ET AL., Respondent(s)

CASE NO.: SC03-494

SUPREME COURT OF FLORIDA

June 17, 2003, Decided

NOTICE DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Lower Tribunal No.: 1D01-4951. Top Rank, Inc. v. Fla. State Boxing Comm'n, 837 So. 2d 496, 2003 Fla. App. LEXIS 102 (Fla. Dist. Ct. App. 1st Dist., 2003)

JUDGES: ANSTEAD, C.J., and WELLS, PARIENTE and LEWIS, JJ., concur. BELL, J., dissents.

OPINION:

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE and LEWIS, JJ., concur.

BELL, J., dissents.

APPENDIX D

DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION

February 9, 2000

Top Rank, Inc.
400 Garden City Place, Suite 120
Garden City, NY 11530

This is in reference to the pay-per-view telecast of the Delahoya/Trinidad boxing match held on September 18, 11530.

We have received responses from all cable companies in Florida that showed or offered this event via pay-per-view. Please find enclosed a summary report of the buys for this event.

The total amount of tax due the Commission on the gross receipts from this flight is $234,555.37. You may make this payment by check, cashier's check or money order.

This payment is due no later than 15 days within receipt of this letter.

Please note that failure to make the payment in within the 15 days will result in a penalty assessment of 10% of the tax payment due for each day the payment is late. This is not a discretionary penalty.

If you have any questions, please do not hesitate to contact me.

Sincerely,

s/ Chris Meffert
Chris Meffert
Executive Director
Florida State Boxing Commission

Enclosure

Cable System Operator	No. of Orders A	B	C	D	Price Sold	Total Price	Tax Owed
Jones Spacelink, Ltd. 603 Camellia Street Panama City Beach, FL 32407 Johnny Harmon (904) 235-1332	43@49.95					$2,147.85	$107.39
Time Warner Communications-North/Deland 2251 Lucien Way, Suite 320 Maitland, FL 32751 Paula Wyatt (407) 667-5969	679@49.95					$33,916.05	$1,659.80
Comcast Cable-Leesburg 8130 County Road 44, Leg A Leesburg, FL 34788 Sonya Young (904) 365-2288	259@11,975.10					$3,101,550.90	$155,077.55
Cox Cable-Ocala/Gainesville Post Office Box147012 Gainesville, FL 32614 Jeanna Pollicer (352) 337-2191	450@49.95					$22,477.50	$1,123.88
Cablevision 1101 Gulf Breeze Parkway, Suite 305 Gulf Breeze, FL 32561 Jim Tuck (850) 934-7700	429@49.95					$21,428.55	$1,071.43
Comcast Cablevision-Bartow/Sebring 3010 Herring Avenue Sebring, FL 33870 Al Mongiello (941) 385-4401 x3021	259@49.95	10@24.98				$13,186.85	$659.34
TCI Cablevision Of Florida, Inc. 209 Dunlawton Avenue, Suite 9 Port Orange, FL 32127 Phil Sagraves (904) 756-4182	100@49.95					$4,995	$249.75

Cable System Operator	A	No. of Orders B	C	D	Price Sold	Total Price	Tax Owed
TCI Cable Of Pinellas County, Inc. 1060 Scotsdale Boulevard Dunedin, FL 34698 Gail Charpin (813) 736-1436	61@49.95					$3,046.95	$152.35
Palm Cablevision 211 St. Joe Plaza Drive Palm Coast, FL 32137 Carolyn Plummer (904) 445-5464	772@49.95			337@49.95		$55,394.55	$2,769,73
Miami Tele-Communications 1306 Northwest 7th Avenue Miami, FL 33136 Carmen Garcia (954) 723-7166	34@49.95					$1,698.30	$84.92
TCI Of Central Florida 911 State Round 434, North Altamonte Springs, FL 32714 Grace Patriarca (407) 869-6600	0					0	0
TCI Cablevision Of Florida, Inc. 5675-5 Micco Road Micco, FL 32976 Jeffrey Hatley (407) 664-9400	1011@49.95					$50,499.45	$2,524.97
TCI Of South Florida 600 North Pine Island Road, Suite 100 Plantation, FL 33324 Emie Martinez (954) 723-7166	800@49.95					$39,960.00	$1,998.00
Time Warner Communications-Bradenton Post Office Box 25206 Bradenton, FL 34206 Rebecca Boehringer (941) 748-3816							

Cable System Operator	A	No. of Orders B	C	D	Price Sold	Total Price	Tax Owed
TCI of Pasco County 10555 Moon Lake Road New Port Richey, FL 34654 Ida Lacy (727) 856-3278 ext. 3029	398@49.95					$19,880.10	$994.01
TCI Of South Dade 9825 Southwest 72nd Street Miami, FL 33173 Anna Perez (305) 595-0924							
Time Warner Cable Post Office Box 1368 Defuniak Springs, FL 32435 Elaine West (904) 892-3155	488@49.95	1@150				$24,525.00	$1,226.28
Bell South Entertainment-Orlando 2500 North Orange Blossom Trail Orlando, FL 32804 Rebecca Barrett (407) 648-8595							
BellSouth Entertainment, Inc.-Ft. Myers 5500-2 Division Drive Ft. Myers, FL 33905 Roger Holleger (813) 693-5700	16@49.95					$799.20	$39.96
Wireless Broadcasting Post Office 361056 Melbourne, FL 32936 Marianne Russell (561) 871-1688							
Gulf And Pacific Communications 1274 Weston Road Weston, FL 33326 Lou Brugman (954) 384-3090 ext. 226							

Cable System Operator	No. of Orders A	B	C	D	Price Sold	Total Price	Tax Owed
Bell South Entertainment 2777 University Blvd W STE 100 Jacksonville, FL 32217-2143 Heather Kobyiik (904) 464-0411							
Comcast Cablevision–West FL/PT Charlotte 5205 Fruitville Road Sarasota, FL 34232 Larry Schweber (941) 371-4444							
Time Warner Communications/Tampa City 525 Grand Regency Boulevard Brandon, FL 33510 Tina Jackson (813) 684-6100 ext. 268							
Time Warner Communications/Hillsborough 525 Grand Regency Boulevard Brandon, FL 33510 Tina Jackson (813) 684-6100 ext.268							
Adelphia Cable-Okeechobee/Boyton/FtMyers 5 West 3rd Street Coudersport, PA 16915 Sophia Minor (814) 274-9830	112@49.95	24@49.95	457@49.95			$29,620.35	$1,481.02
Comcast Cablevision-WPB/Boca Raton/FTL 1401 Northpoint Parkway West Palm Beach, FL 33407 Janet Epstein (407) 478-5866	1390@49.95	788@49.95				$108,791.10	$5,439.56
TCI Cablevision Of The Treasure Coast 940 12th Street Vero Beach, FL 32960 David Davis (561) 567-3473	114@49.95					$5,694.30	$284.72

Cable System Operator	No. of Orders A	B	C	D	Price Sold	Total Price	Tax Owed
Comcast Cablevision-Sarasota/Venice 5205 Fruitville Road Sarasota, FL 34232 Larry Schweber (941) 342-3511							
Adelphia Cable-South Dade/Key Biscayne 5 West 3rd Street Coudersport, PA 16915 Sophia Minor (814) 274-9830	783@49.95	63@49.95				$42,257.70	$2,112.89
MediaOne/Hialeah 141 Northwest 16th street Pompano Beach, FL 33060 Lori Dillon (941) 793-9683							
Time Warner Communication-Lake City Route 10, Box 416 Lake City, FL 32025 Denise (904) 752-6161	21@49.95	17@54.95				$1,983.10	$99.16
Telecable/TCI Of North Broward 950 Northwest 66th Avenue Margate, FL 33063 Stuart Easterly (305) 972-7593	948@49.95	11@37.45				$47,764.55	$2,388.23
Time Warner Communications-Lakeland Post Office Box 3800 Lakeland, FL 33802 Janet Boyette (813) 686-5925	183@49.95					$9,140.85	$457.04
Time Warner Communications-Melburne 2251 Lucien Way, Suite 320 Maitland, FL 32751 Paula Wyatt (407) 667-5969	1083@49.95					$54,095.85	$2,704.79

Cable System Operator	No. of Orders A	B	C	D	Price Sold	Total Price	Tax Owed
Jones Intercable-Davie 6565 Nova Drive Davie, FL 33317 M.J. Safra (305) 731-9227							
Cox Communications-Fort Walton 2205 La Vista Drive Pensacola, FL 32504 Wendi Boutiette (850) 857-4563	495@45.95	3@24.98				$22,820.19	$1,141.01
Time Warner Communications-Tampa 525 Grand Regency Boulevard Brandon, FL 33510 Dennis Wheeler (813) 684-6100 ext 259							
Comcast Cablevision-Tallahassee/Quincy 3760 Hartsfield Road Tallahassee, FL 32303 Antoinette Norton (850) 574-4016	658@49.95					$32,867.10	$1,643.36
Comcast Communications-Davie 1401 Northpoint Parkway West Palm Beach, FL 33407 Janet Epstein (561) 478-5866	543@49.95					$27,122.85	$1,356.14
Cox Communications-Pensacola 2205 La Vista Drive Pensacola, FL 32504 Wendi Boutiette (850) 857-4563	1188@49.95	28@24.98				$55,288.04	$2,764.40
Adelphia National Cable/Leadership 5 West 3rd Street Coudersport, PA 16915 Sophia Minor (614) 274-9830	256@49.95	187@49.95				$22,127.85	$1,106.39

Cable System Operator	No. of Orders A	B	C	D	Price Sold	Total Price	Tax Owed
Comcast Cablevision-Panama City Post Office Box 311 Panama City, FL 32401 Susan Pitts (904) 769-2929	105@49.95					$5,244.75	$262,24
Time Warner Communications-Win Hav/Lec Post Office Box 3800 Lakeland, FL 33802 Janet Boyette (813) 686-5925	1098@49.95	160@49.95				$62,837.10	$3,141.86
BellSouth Entertainment, Inc. 3705 US Highway 98 South, Suite 14 Lakeland, FL 33813 Jacob Kohn (941) 665-7777	20@49.95					$999	$49.95
Adelphia Cable Orlando/Inverness/TPA 5 West 3rd Street Coudersport, PA 16915 Sophia Minor (814) 274-9830	661@49.95	12@49.95	61@49.95			$36,663.30	$1,833.17
Hunter's Creek Cable 13801 Town Loop Boulevard Orlando, FL 32837-610 Bill Strickler (407) 240-4040	78@49.95					$3,896.10	$194.81
MediaOne Post Office Box 413018 Naples, FL 34101 Kim Rogers (941) 793-9606	1040@49.95					$51,948.00	$2,597.40
Time Warner Communications-St. Pete/Mader 2530 Drew Street Clearwater, FL 33765 Kitra Kalletta (727) 797-1818 x 374	1298@49.95					$64,735.20	$3,236.76

Cable System Operator	No. of Orders A	B	C	D	Price Sold	Total Price	Tax Owed
Media One-Jax/Orge Pk/Fernandin 5934 Richard Street Jacksonville, FL 32216 Regina O'Brien (904) 619-1958	2310@49.95					$115,385	$5,769.23
MediaOne/Pompano 141 Northwest 16th Street Pompano Beach, FL 33060 Lori Dillon (941) 793-9683							
Advance Cable Communications 12409 Northwest 35th Street Coral Springs, Fl 33065 Michelle Fitzpatrick (954) 753-0100	422@49.95	267@44.95				$33,080.55	$1,654.03
Time Warner Communications-Orl/Kis/WG/Ev 2251 Lucien Way, Suite 320 Maitland, FL 32751 Paula Wyatt (407) 667-5969	6636@49.95					$331,468.20	$16,573.41
Time Warner Communications-Clearwater 2530 Drew Street Clearwater, FL 33765 Kitra Kalletta (727) 797-1818 ext. 374	1441@49.95					$71,977.95	$3,598.90
Adelphia Cable-Rivieria Beach/West Boca 5 West 3rd Street Coudersport, PA 16915 Sophia Minor (814) 274-9830	802@49.95	355@49.95				$57,792.15	$2,889.61
EVENT GRAND TOTAL						**TOTAL PRICE** **$4,691,107.48**	**TAX OWED** **$234,555.37**

APPENDIX E

FLORIDA STATUTE ANNOTATED

548.06. Payments to state; exemptions

(1) A promoter holding a match shall, within 72 hours after the match, file with the commission a written report which includes the number of tickets sold, the amount of gross receipts, and any other facts the commission may require. For the purposes of this chapter, total gross receipts include:

(a) The gross price charged for the sale or lease of broadcasting, television, and motion picture rights without any deductions for commissions, brokerage fees, distribution fees, advertising, or other expenses or charges;

(b) The portion of the receipts from the sale of souvenirs, programs, and other concessions received by the promoter;

(c) The face value of all tickets sold and complimentary tickets issued, provided, or given; and

(d) The face value of any seat or seating issued, provided, or given in exchange for advertising, sponsorships, or anything of value to the promotion of an event.

(2) Where the rights to telecast a match or matches held in this state under the supervision of the Florida State Boxing Commission are in whole owned by, sold to, acquired by, or held by any person who intends to or subsequently sells or, in some other manner, extends such rights in part to another, such person is deemed to be a promoter and must be licensed as such in this state. Such person shall, within 72 hours after the sale, transfer, or extension of such rights in whole or in part, file with the commission a written report that includes the number of tickets sold, the amount of gross receipts, and any other facts the commission may require.

(3) A concessionaire shall, within 72 hours after the

match, file with the commission a written report that includes the number of tickets sold, the amount of gross receipts, and any other facts the commission may require.

(4) Any written report required to be filed with the commission under this section shall be postmarked within 72 hours after the conclusion of the match, and an additional 5 days shall be allowed for mailing.

(5) The written report shall be accompanied by a tax payment in the amount of 5 percent of the total gross receipts exclusive of any federal taxes, except that the tax payment derived from the gross price charged for the sale or lease of broadcasting, television, and motion picture rights shall not exceed $40,000 for any single event.

(6)(a) Any promoter who willfully makes a false and fraudulent report under this section is guilty of perjury and, upon conviction, is subject to punishment as provided by law. Such penalty shall be in addition to any other penalties imposed by this chapter.

(b) Any promoter who willfully fails, neglects, or refuses to make a report or to pay the taxes as prescribed or who refuses to allow the commission to examine the books, papers, and records of any promotion is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

APPENDIX F

FLORIDA ADMINISTRATIVE CODE

61K1-1.042. Closed Circuit Telecasts; Requirements; Penalty for Late Filing.

(1) Where the Florida distribution rights for a closed circuit telecast to be viewed in this state are in whole owned by, sold to, acquired by or held by any person who intends to or subsequently sells or, in some other manner, extends such rights in part to another, such person is deemed to be a promoter and must be licensed as such in this state. Closed circuit telecasts of boxing or kickboxing events shall not be telecast from, in or into Florida except under the auspices of a promoter licensed in this state and such promoter shall be responsible for filing the appropriate reports and tax payments with the commission as referenced herein.

(2) A promoter holding, showing or telecasting a closed circuit telecast utilizing facilities other than a cable system's pay-per-view facilities, shall complete and submit to the commission Form BPR-0009-481, entitled Application For Permit For Closed Circuit Event, incorporated herein by reference and effective September, 1993. A promoter holding, showing or telecasting a closed circuit telecast utilizing facilities other than a cable system's pay-per-view facilities, shall complete and submit to the commission Form BPR-0009-480, entitled Application For Permit For Pay Per View Event, incorporated herein by reference and effective September, 1993. This form shall be submitted prior to the promoter selling or negotiating the sale of rights to broadcast such closed circuit telecast to any person.

(3) The promoter shall notify the commission of the names and addresses of all facilities to or through which the closed circuit match will be telecast.

(4) Any promoter holding, showing or telecasting any

match via a closed circuit telecast and viewed within Florida, whether originating in Florida or not, shall file a written report. The report shall state the number of tickets or orders sold, the amount of gross receipts from the sale of tickets or orders excluding federal and state sales tax and the amount paid to the promoter by the facility for the right to receive the broadcast of the closed circuit event.

(5) Unless otherwise directed by the commission, a promoter holding, showing or telecasting a closed circuit telecast utilizing facilities other than a cable system's pay-per-view facilities, shall file such report within 72 hours following the date of the telecast and the report shall be accompanied by a tax payment of 5 percent of the total gross receipts derived from the sale of tickets excluding federal and state sales tax. If the required report and tax are filed by mail, the promoter shall be allowed an additional5 days for mailing.

(6) Each cable system operator whose pay-per-view facilities were utilized to telecast a closed circuit program of matches shall, within 30 calendar days following the date of the telecast, file with the commission a report stating the number of orders sold. At such time as all cable systems have filed reports of orders, the commission shall provide a summary report to the promoter. This summary report shall list the name and address of each cable system, the number of orders reported to have been sold and the amount of tax due. The amount of tax shall be 5% of the total gross receipts from the sale of orders excluding state and federal sales tax. Within 15 days following the date of receipt of the summary report by the promoter, the promoter shall pay to the commission the amount of tax due as stated on the summary report. If such payment is made by mail, the promoter shall be allowed an additional 5 days for mailing.

(7)(a) Failure of the promoter to file either or both the report and tax payment within the prescribed timeframe shall

result in a daily fine of 10 percent of the amount of the tax payment due or $25, whichever is greater. If the fine is calculated based upon the 10 percent of the amount of tax due, the fine shall not exceed $5,000. The fine shall begin the day following the end of the time frame described above and shall continue for each day that either or both the report is not filed or the tax payment remains unpaid.

(b) If the report or tax payment filed with the commission is determined to be understated, the fine assessment shall apply to the balance remaining after crediting the tax payment filed. The fine shall commence 72 hours following receipt of notice by the promoter of the underpayment. In addition to the penalty stated above, no promoter shall be permitted to telecast, hold or show any future closed circuit matches or program of matches in this state unless all delinquent taxes and outstanding fines have been paid to the commission.

Specific Authority 548.003 FS. Law Implemented 548.061 FS. History--New 4-6-89, Amended 8-28-89, 5-13-90, Formerly 7F-1.042, Amended 9-10-95, 4-3-00.

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY

THE STATE OF GEORGIA

SHOWTIME NETWORKS, INC.,	)	
Plaintiff,	)	
v.	)	
GEORGIA STATE BOXING COMMISSION; MOSES ECTOR, Member and Chair, Georgia State Boxing Commission; LORING BAKER, Member, Georgia State Boxing Commission; RICK CAMP, Member, Georgia State Boxing Commission; BUDDY DAVIS, Member, Georgia State Boxing Commission; LES SCHNEIDER, Member, Georgia State Boxing Commission; and THURBERT E. BAKER, Attorney General of the State of Georgia.	)	**CIVIL ACTION FILE NO. 1999CV04184**
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION TO DISMISS

This case is brought by Showtime Networks, Inc. ("Showtime") against the Georgia Boxing Commission, its individual members and the Attorney General. The Complaint seeks a declaratory judgment and injunctive relief

under state law and 42 U.S.C. § 1983 that the Georgia Boxing Act violates the Plaintiff's right to free speech, violates the Supremacy Clause and violates the Commerce Clause.

The underlying facts to this dispute are straightforward. In 1998, the Georgia legislature amended the Georgia Boxing Act, at O.C.G.A. § 43-8A-1 *et seq.*, to regulate telecasts of matches which were held outside of Georgia but were broadcast in–state. As part of this new regulation, the Boxing Commission has the authority to require telecast promoters[1] to obtain a license to broadcast, pay an application fee of 2% gross revenue, and obtain a permit. Additionally, the telecast promoter is required to pay up to 8% of revenues after the show aired. O.C.G.A. § 43-8A-40(b) and § 43-8A-80 through 82. If the promoter violated these provisions, the Commission is authorized under the statute to take a number of actions, and the telecast promoter is exposed to potential criminal and civil penalties.

In November of 1998, the Plaintiff was notified by letter from the Boxing Commission that it was considered to be a promoter and subject to the statute requirements. Plaintiff refused to pay the statutory fees and refused to obtain the license. On January 16, 1999, Plaintiff aired the Tyson-Botha boxing match via pay-per-view.[2] Although the match itself was relatively short, the broadcast lasted four hours, including all the pre-, during and post-match commentary.

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[1] Telecast promoters are defined under the statute as "any promoter who shows or ensures to be shown in this state a closed circuit telecast of any professional boxing event, whether or not the telecast or event originates in this state..." O.C.G.A. § 43-8A – 1(23). A closed circuit telecast is also defined under the statute as "any telecast which is not intended to be available for viewing without the payment of a fee, collected for or based upon each event viewed . . . and includes the term 'pay-per-view' ...." O.C.G.A. § 43-8A-1(5).

[2] The actual boxing match was held in Las Vegas, Nevada.

This case is currently before the Court on the parties' cross-motions for summary judgment as to the First Amendment issue and Defendants' motion to dismiss the § 1983 claims. All other issues have been stayed pending resolution of these issues.

Cross-Motions for Summary Judgment

In its motion for summary judgment, Plaintiff contends, first, that cable TV programmers, such as Showtime, are engaged in "speech" protected by the First Amendment and that the boxing telecasts themselves are "speech." It argues that by singling out speech related to boxing only, these statutes, O.C.G.A. §§ 43-8A-80 through 82, impose content based restrictions on free speech. It follows, then, that strict scrutiny is applied. Plaintiff argues that under strict scrutiny, these statutes must fail because they are not precisely drawn to serve a compelling state interest. In fact, Plaintiff argues that the only state interest for these statutes is to raise revenue, which is not a compelling interest under the law. Plaintiff also argues that there is no health, safety or welfare purpose, because the statute regulates even boxing matches which occur out of state. Plaintiff further contends that, even assuming intermediate scrutiny applies, the statutes at issue still fail because there is no evidence of legislative intent or that the Defendants actually considered any secondary effects of the boxing telecasts at the time the statutes were enacted.

In response, Defendants filed their own motion for summary judgment. In this motion, they contend that summary judgment is proper against Plaintiff because this is not a content based regulation. In determining whether or not a statute is content neutral, Defendants assert that this Court must look to whether or not the regulation is imposed because of disagreement with the message conveyed and the offered justification for the statutes. In this case, Defendants argue that there are numerous health, safety and welfare

reasons for these statutes, and that these regulations were not imposed because of a dislike for boxing itself.

While Defendants concede that some aspects of the telecast do involve "speech" which is protected under the First Amendment, they contend that the regulation of a boxing match is not speech. Furthermore, they argue that there is only an "incidental" effect on the speech through the regulations imposed under this statute. Defendants contend that under a content neutral regulation such as the one at bar, only intermediate scrutiny is necessary. Under intermediate scrutiny, the government must establish (1) an important government interest, as opposed to a compelling interest, (2) that the governmental interest is unrelated to the suppression of speech, and (3) that the incidental restriction on speech is no greater than necessary to further the governmental interest. *United States v. O'Brien*, 391 U.S. 367 (1968); *Turner Broadcasting*, 512 U.S. 622 (1994).

Defendants further contend that this intermediate scrutiny is satisfied. They assert that the government interest served through these statutes are: having adequate and safe structures for spectators, knowing where crowds are likely to be so this information can be relayed to police and fire departments, providing the opportunity to search their records for medical history of the boxers, and monitor the outcome of the event to ensure accurate records. Additionally, Defendants contend that the percentage fee is justified by the need to raise revenues, which Defendants argue is an important governmental interest.

The initial consideration before this Court is whether or not the regulations at hand impose content-based restrictions upon speech. After a review of the statutes, this Court finds that the Boxing Act on its face imposes a tax based solely upon the content of the telecast. Section 43-8A-82 requires reporting, licensing, and payment of fees exclusively based upon the closed circuit broadcast of a boxing match. This

Court is not aware of, nor has the State shown, any other form of closed circuit broadcast which is similarly taxed. Clearly, this tax is imposed based only upon the content of the broadcast. Under First Amendment analysis, this Court should apply strict scrutiny. *Leathers v. Medlock*, 499 U.S. 439 (1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987).

However, Defendants contend that strict scrutiny should not apply because boxing, as a sporting event, is not protected by the First Amendment as it does not constitute "speech." This Court does not agree. It is apparent that the First Amendment protects entertainment and expressive conduct as forms of speech. *See, Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991); *Barnes v. Glen Theatre, Inc.*, 401 U.S. 560 (1991); *Shad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *United States Satellite Broadcasting Co., Inc. v. Lynch*, 41 F. Supp.2d 1113 (E.D. Ca. 1999). The broadcast at issue here is entertainment and not merely a sporting event. It is undisputed that the match itself was quire short; however, the telecast lasted approximately four hours, with pre-, during, and post-match commentary. Plaintiff is not a boxing promoter but is a seller/distributor of pure entertainment, and First Amendment protections apply.[3] "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. [Cit.]. . . Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of the*

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[3] This Court also does not agree with the State that this is a form of speech which involves both expressive and non-expressive elements. There is a distinction between the match itself and the telecast of the boxing event. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991). In this case, the sale of this broadcast was pure entertainment for its viewers. As such, the test enunciated in the *United States v. O'Brien*, 391 U.S. 367 (1968), and urged by the State, does not apply. *See also, United States Satellite Broadcasting Co. supra.*

University of Virginia, 515 U.S. 819, 828 (1995); s*ee also, Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994); *Simon & Schuster, supra* at 115. As this case involves a content-based regulation of speech, under a strict scrutiny analysis, Defendants must demonstrate that the tax is "necessary to serve a compelling state interest and ...[is] narrowly drawn to achieve that end." *Simon & Schuster, supra* at 118; *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Gillert Commun. Of Atlanta, Inc. v. Becker*, 807 F.Supp. 757 (N.D. Ga. 1992).

In its Brief and at the hearing, the State asserted that it has a compelling state interest in ensuring adequate, safe structures for spectators, knowing where crowds would accumulate, providing an opportunity to search its records for the medical history of the boxers and monitor the outcome of the match to ensure accurate records in this State. Additionally, the State argued that the tax was justified by the need to raise revenues.

After consideration, this Court finds that none of these asserted governmental interests are sufficiently compelling to satisfy First Amendment strict scrutiny. It has been specifically held that an interest in raising revenues, as a matter of law, does not justify a content-based tax on speech. *Arkansas Writers' Project, supra* at 231-232. Additionally, the Defendants have presented no evidence that the tax imposed under this statute bears any relationship to any of their asserted governmental interests. Furthermore, some of the asserted governmental interests are clearly pretextual, as this State, for example, can have little to no interest in the medical records of boxers who are fighting outside of this State.

For the above reasons, this Court finds that the statute at issue fails strict scrutiny analysis and violates the First Amendment protections on the right to free speech. Therefore, Plaintiff's motion for partial summary judgment

on this issue is **GRANTED**, and Defendants' cross-motion for summary judgment is **DENIED**. There being no just reason for delay, final judgment is hereby entered in favor of Plaintiff and against Defendants on Plaintiff's claim for violation of its constitutional rights to free speech under the First Amendment.

Defendants' Motion to Dismiss § 1983 Claims

In addition, Defendants moved to dismiss Plaintiff's claims under § 1983, on the grounds that the Boxing Commission is not a "person" under the statute and Plaintiff has an adequate state remedy which precludes recovery under this statute. Plaintiff responded and argued that it also sought relief against the individual members of the Commission, who clearly are persons, and that the Tax Injunction Act, relied on in the case cited by defendant, does not apply in this case.

In determining whether the Tax Injunction Act[4] bars Plaintiff's § 1983 claims, this Court must decide two issues: is the challenged assessment a tax or a free, and does the state furnish an adequate remedy which is "plain, speedy and efficient." *Cumberland Farms, Inc. v. Tax Assessor, State of Maine*, 116 F.3d 943 (1st Cir. 1997). This is a question of law for the Court. *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.*, 166 F.3d 835 (6th Cir. 1999).

Under the case law, the determination of whether an assessment is a tax or a fee depends on an evaluation of three general factors: the entity which imposes the assessment, the parties upon whom the assessment is imposed, and the ultimate use of the funds collected. *American Landfill,*

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[4] The Tax Injunction Act, at 28 U.S.C. § 1341, provides: "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

supra; Cumberland Farms, supra; Bidart Bros. v. California Apple Comm'n., 73 F.3d 925 (9th Cir. 1996); *San Juan Cellular Tel. Co. v. P.S.C.*, 967 F.2d 683 (1st Cir. 1992); *Trading Co. of N. America v. Bristol Township Auth.*, 47 F.Supp 2d 563 (E.D. Pa. 1999). While the distinction between a tax and a fee is often a blurry one; generally, the classic tax sustains the essential flow of revenue to the government, is imposed by the legislature, and is designed to benefit the entire community, which the classic fee is linked to some regulatory scheme, is imposed by an agency upon those it regulates, and is designed to raise money to help defray an agency's regulatory expenses. *Home Builders Ass'n v. City of Madison,* 143 F.3d 1006 (5th Cir. 1998); *Cumberland Farms, supra.*

In the present case, these factors weigh heavily in favor of determining that this assessment is a tax. Although the assessment is levied against a small group, which weighs in favor of finding a fee, this is the only factor which does so. The assessment has been imposed by the Georgia legislature via a state statute, which is an indication of a classic tax. Most importantly, it is undisputed that the funds collected under the statute are placed in the general revenues for the State. Although they may eventually be used for the benefit of the Boxing Commission, there is not requirement under the statute that these funds be so used, and they could be used for other purposes as the legislature determines. Under the case law, this is the chief distinction between a tax and a fee, and this factor falls squarely under a classic tax analysis. *See, American Landfill, supra; Cumberland Farms, supra.* For these reasons, this Court finds that the assessment imposed by the statute at issue is a tax, not a fee.

The next issue is whether or not Plaintiff is afforded an adequate remedy under State law. Plaintiff argues that it does not have such a remedy because it only has equitable remedies and under *Nat'l Private Truck Council, Inc. v.*

Oklahoma Tax Comm'n., 515 U.S. 582 (1995), only legal remedies are adequate. This Court does not agree. In *Nat'l Private Truck Council*, the United States Supreme Court stated that so long as state law provides a clear and certain remedy, in the form of either predeprivation remedies (such as injunctive relief) or post deprivation remedies (such as a refund), then a § 1983 claim will be barred. *Id.* at 587. Clearly, the Supreme Court contemplated both equitable as well as legal remedies as being sufficient.

Moreover, this Court finds that Plaintiff has an adequate remedy under state law in this case. A "plain, speedy and efficient" remedy is one which provides taxpayers with a full hearing and a judicial determination at which they may raise any constitutional objections to the tax. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981); *Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484 (N.D. Ga. 1993). Not only does Plaintiff have a right to equitable relief, such as that sued for in this case, but state law provides for a refund. Specifically, O.C.G.A. § 48-2-35(a) provides; "[a] taxpayer shall be refunded any and all taxes of fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily ..." Under both of these remedies, Plaintiff is entitled to raise, and in fact has raised, any objections to the constitutionality of the tax at issue. Furthermore, even though the refund statute requires Plaintiff to exhaust some administrative remedies prior to proceeding in Superior Court, this alone is not sufficient to determine the remedy is not "plain, speedy and efficient." *Rosewell, supra* at 507-08.

For these reasons, this Court finds that Defendants' motion to dismiss should be and hereby is **GRANTED**, Plaintiff's claims under 42 U.S.C. § 1983 are hereby **DISMISSED**.

SO ORDERED this 23rd day of November, 1999

s/ Stephanie B Manis
Stephanie B. Manis
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:
Warren R. Calvert, Sr. Asst. Attorney General
John L. Coalson, Esq.
Bernard Nash, Esq.